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Supreme Court of the United States

OCTOBER TERM, 1978

78-335

No. ____

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

vs.

ROBERT LaFONTAINE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, The Chesapeake and Ohio Railway Company, prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the order entered April 18, 1978 in Case No. 76-2491, entitled *Robert LaFontaine, Plaintiff-Appellee* v *The Chesapeake and Ohio Railway Company, Defendant-Appellant*, and the order of that court denying Petitioner's Petition for Rehearing.

OPINIONS BELOW

The order of the Court of Appeals is unreported, and is printed in the attached Appendix at p. A1.

The first opinion of the district court, conditionally granting petitioner's motion for summary judgment is unreported, and is printed in the Appendix at p. A5. The subsequent order of the district court, which gives rise to this petition, was not accompanied by an opinion; said order is printed in the Appendix at p. A3.

STATEMENT OF JURISDICTION

The order of the Court of Appeals was entered on April 18, 1978. On June 1, 1978 the order of the Court of Appeals denying petitioner's petition for rehearing and suggestion for rehearing en banc was entered. That order is printed in the Appendix, p. A2. This petition is, therefore, timely.

This Court's jurisdiction is invoked under 28 USC § 1254(1) and Rule 19 of the Rules of this court.

QUESTION PRESENTED

Where a railroad and union, pursuant to the Railway Labor Act, agree to establish a special adjustment board to which an employee's claim for wrongful discharge is submitted by his union on his behalf and with his full

knowledge and authorization, is, as United States Court of Appeals for the Sixth Circuit ruled, the award of that board upholding the discharge, subject to attack as violative of due process of law solely because the board did not give the employee actual notice of the board's hearing or is the board entitled to rely on the union's continuing and unrevoked authority to represent the employee as this Court and the Court of Appeals for the Seventh Circuit has indicated.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

45 USC § 153 First (j):

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

45 USC § 153 First (i):

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the

carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

45 USC § 152, Third:

"Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

45 USC § 152, Fourth:

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any

way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

29 CFR § 1207.4(b):

"*Filing of agreements.* The original agreement creating the PL Board under Public Law 89-456 shall be filed with the National Mediation Board at the time it is executed by the parties. A copy of such agreement shall be filed by the parties with the Administrative Officer of the National Railroad Adjustment Board, Chicago, Ill."

29 CFR § 1207.2(c):

> "Docketing of PL Board agreements: The National Mediation Board will docket agreements establishing PL Board, which agreements meet the requirements of coverage as specified in Pub. L. 89-456. No neutral will be appointed under § 1207.1(c) until the agreement establishing the PL Board has been docketed by the Mediation Board."

STATEMENT OF THE CASE

This case arises under the Railway Labor Act, specifically 45 U.S.C. § 153, First (p), and (q), and § 153, Second.

Respondent ("plaintiff"), a former employee of petitioner ("defendant"), was discharged from his employment as the result of an altercation on defendant's premises on April 26, 1971.

Plaintiff's discharge was appealed by his duly authorized bargaining representative, the United Transportation Union, in accordance with the provisions of the collective bargaining agreement between defendant and plaintiff's representative, United Transportation Union.

Pursuant to the provisions of the Railway Labor Act, defendant, The Chesapeake and Ohio Railway Company, and the United Transportation Union entered into an agreement under the provisions of 45 U.S.C.A. § 153 Second, to submit the matter of plaintiff's claimed wrongful discharge to Public Law Board 347 for resolution. Plaintiff authorized his union (United Transportation Union) to handle the appeal to Public Law Board 347, and was aware of the fact that

L. J. Wojtaszak, General Chairman, United Transportation Union, was handling the appeal of plaintiff's grievance to Public Law Board 347. Additionally, under the provisions of Article 44 of the Constitution of the United Transportation Union, said Union had authority to represent plaintiff in the handling of his claim of wrongful discharge. Plaintiff did not at any time claim that he revoked the authority of the United Transportation Union to handle his claim. In due course, Public Law Board 347 rendered its decision, upholding the position of the defendant that the discharge of plaintiff was justified.

Thereafter plaintiff commenced this action seeking reinstatement with back-pay, or in the alternative, that the adverse award of Board 347 be set aside and the matter be remanded for a new hearing. Defendant moved for summary judgment. On February 11, 1975, District Judge James P. Churchill, in a written opinion (reprinted in the Appendix, *infra*, p. A5), granted defendant's motion, but allowed plaintiff time within which to file an amended complaint, and entered his order to that effect (reprinted in the Appendix, *infra*, p. A4).

Within the time limited, plaintiff filed an amended petition realleging the claims in his original petition and adding:

> "2. Public Law Board No. 347 violated the Act USC § 153 by failing to give plaintiff notice of the hearing conducted by said Board in this case.
>
> "3. Plaintiff incorporates by reference the affidavit previously submitted by him in this action denying receipt of a notice of hearing."

Subsequently, plaintiff moved for summary judgment and on his amended petition claiming lack of notice to him of the hearing before Board 347. Following briefing and argument, Judge Churchill granted plaintiff's motion without opinion, and entered an order (reprinted in the Appendix, *infra*, p. A3) setting aside the award of Board 347 and remanded the matter for rehearing on the merits. Defendant thereafter filed a motion for rehearing, which was denied without opinion.

Defendant then filed its appeal with the United States Court of Appeals for the Sixth Circuit from the adverse order and the denial of defendant's motion for rehearing.

In his affidavit attached to the brief in opposition to his motion for summary judgment, plaintiff averred:

> "7. That at no time did I receive any notice whatsoever of the hearing, if any was held, before the Public Law Board. Further at no time did the Board give me notice of my right to a hearing."

In his deposition, plaintiff denied receiving written or oral notice of the hearing before the Board from anyone. His union representative promised to advise plaintiff when the Board convened so that he could assist in presenting his case. Although plaintiff discussed his case with the representative 10 or 12 times, he never heard from him until the award had been rendered. Plaintiff, however, authorized the union to handle the appeal, asked the union to make the submission, and knew his case was pending before Board 347.

There was no written or transcribed opinion on the grant by the District Court of plaintiff's motion resulting in the remand and the appeal to the United States Court of Appeals for the Sixth Circuit, but the foregoing evidence was before the District Court at the time of its order and it is the only evidence touching on the issue of notice.

On April 18, 1978, the United States Court of Appeals for the Sixth Circuit affirmed (reprinted in the Appendix, *infra*, p. A2) the judgment of the District Court, stating that its previous decision in *Cole* v *Erie Lackawanna Ry Co*, 541 F2d 528 (6th Cir, 1976) was dispositive of the appeal. On June 1, 1978, the Sixth Circuit denied (reprinted in the Appendix, *infra*, p. A1) defendant's petition for rehearing.

Defendant now seeks review of the Court of Appeals' decision of April 18, 1978 and of its order of June 1, 1978, denying the petition for rehearing.

ARGUMENT

A. Introduction

In 1966, Congress adopted legislation[1] passed upon by the Sixth Circuit in this case creating an entirely new scheme for the adjudication of "minor"[2] disputes arising under the Railway Labor Act — disputes which involve interpretation or application of collective bargaining agreements in the industry, and employee

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[1] Public Law 89.-456.80 stat § 208 (effective June 30, 1966).

[2] *Elgin, J & E R Co* v *Burley*, 325 US 711 (1945).

grievances. Prior to that legislation, resolution of minor disputes was within the sole jurisdiction of the National Railroad Adjustment Board (NRAB). Dissatisfaction by Congress with docket congestion of the Adjustment Board prompted the 1966 legislation which "drastically revise[d] the procedures to remedy the defects," as the Court itself observed in *Walker* v *Southern Ry Co*, 385 US 196 at 198 (1966).

The 1966 legislation, although retaining the Adjustment Board, added an alternative forum for disposition of minor disputes, called "special adjustment boards." The statutory jurisdiction of such boards is the same as that of the older NRAB, but the similarity ends there for special adjustment boards (or "public law boards" as they are more commonly referred to), unlike the NRAB, are not standing bodies of appointed arbitrators prone to develop a case backlog, but were designed to be created speedily by the parties on an ad hoc basis to resolve promptly a specific dispute or (as here) several disputes, following which the board automatically dissolves.

In the usual situation, the convening of a public law board is a rather simple matter. Upon request of either the union or the railroad to the other, the two are required by law to enter into a written agreement within 30 days to establish a public law board. The agreement must be filed with the National Mediation Board [29 CFR § 1207.4(b)] and is docketed if agreement meets "the requirements of coverage as specified in Pub. L. 89-456" [29 CFR § 1207.2(c)]. The board is composed of a representative of each of the union and the railroad, and a neutral member selected by the parties (as in this case) or appointed by the National Mediation Board at the request of either party. Statutory provision is made for resolution of any disagreements

concerning convening of the public law board by the National Mediation Board.

Unlike the statutory procedure governing the older NRAB under which an employee (as well as a railroad or union) may on his own invoke its jurisdiction, the amendatory legislation of 1966 allows only the union or the railroad, and not an employee to convene a public law board. This departure from the older procedure was not a matter of congressional inadvertence. Congress wished the process to be speedy and thus excluded direct employee claims:

> "When either party requests a special adjustment board, the committee contemplates that a number of disputes will be referred to that board. The committee believes it would only result in a proliferation of special boards to request a special board for each claim presented by an employee.
>
> "Carrier witnesses testified that many of the claims presented by employees and disputes referred to the Board are frivolous or at least without merit. Although the committee is not prejudging any claims, it believes that claims should be carefully screened by the party submitting it. The committee believes that the merits of every claim should be carefully considered by both the carrier and employee representative in an attempt to resolve the dispute before submission to the Board."[3]

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[3] S. Rep. 1201, 89th Cong., 2nd Sess. (1966) Code Cong. & Admin. News, p. 2286.

Certainly an employee whose grievance has been submitted to a public law board has rights concerning his claim. But just what those rights may be and just who has the duty to protect his interests has not been decided by this Court. However, the Court of Appeals for the Sixth Circuit has begun to define those rights and to assign those duties in this and one other case, *Cole* v *Erie-Lackawanna Ry Co*, 541 F2d 528 (1976), which the Court declined to review [433 US 914 (1977)]. This case, involving much different facts than *Cole*, was disposed of by the Court of Appeals solely and summarily on the basis of that decision.

Taken together, the decision below and the *Cole* opinion mark the departure of the Sixth Circuit from the traditional wisdom of opinions of this Court and the Seventh Circuit, and its embarkation on a journey through the compulsory arbitration provisions of the Railway Labor Act, the eventual destination is unknown.

Public law boards now and for some time have carried the major share of the burden of resolving union disputes in the railroad industry as the following table demonstrates:

YEAR	NRAB CASES Disposed Of	P. L. BOARD CASES Disposed Of
1976[4]	886	5606
1975[5]	1033	5404
1974[6]	1322	6439
1973[7]	1387	N/A
1972[8]	1313	3718

Because the public law board mechanism has become the major vehicle for resolution of minor disputes under the Railway Labor Act, we respectfully suggest that the time has come for this Court to consider for the first time the rights of the employees and whose duty it is to protect them, and thus whether the approach of the Sixth Circuit coincides with the intent of Congress. This petition, seeking review of issues which go precisely to those areas, presents this Court with an ideal opportunity.

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[4] Forty-Second Annual Report of the National Mediation Board, at 56-57.

[5] Forty First Annual Report of the National Mediation Board, at 43-45.

[6] Fortieth Annual Report of the National Mediation Board, at 43-44, 78.

[7] *Ibid*.

[8] Thirty-Eighth Annual Report of the National Mediation Board, at 45-46, 97.

B. The Order of the Court of Appeals for the Sixth Circuit in tandem with its opinion in Cole v Erie-Lackawanna Ry Co, 541 F2d 528, misconceives the nature and purpose of Railway Labor Act amendment creating the public law board mechanism.

The order below was entirely based upon the Sixth Circuit's still recent decision in *Cole*. *Cole* ruled that an employee whose grievance has been submitted to a public law board is entitled to the benefits 45 USC § 153 First (j). That provision reads:

> "Parties may be heard either in person, by counsel, or by other representatives as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

The Sixth Circuit in *Cole*, finding no reason not to apply this portion of the statute governing the National Railroad Adjustment Board to that part of the statute providing for public law boards, but purporting to find support in the legislative history of the public law board amendment, so ruled. Since the notice provision of the statute had not been complied with in *Cole*, nor in this case, the Sixth Circuit in both instances affirmed lower court orders upsetting otherwise valid public law board awards.

Whether the Sixth Circuit correctly ruled that the 1966 public law board legislation "incorporated [existing Section 153 First (j)] by implication" [541 F2d at 533],

depends upon whether the court correctly concluded that public law boards were legislatively intended to be congruent to the railroad adjustment board. While it is clear, as the Sixth Circuit concluded, that Congress intended to "remove the backlog of cases"[9] which has been accomplished by the proliferation of public law boards, it is equally clear that Congress, in addition, wished to "provide an expeditious means of handling future cases."[10] Obviously, wholesale importation of Section 153 First (j) into public law board procedure cannot possibly alleviate the NRAB backlog. Instead, as we will demonstrate, such a construction of the 1966 amendment frustrates achievement of the other legislative goal of expeditious handling. For if Section 153 First (j) applies then so must the panoply of employee rights guaranteed by this Court's decision in *Elgin, J & E R Co* v *Burley*, 325 US 711 (1945) (I).

In *Elgin, J & E R Co* v *Burley, supra*, this Court established once and for all a railroad employee's right individually to participate at all stages in the handling of his grievance, and ruled that Section 153 First (j) accorded him the individual rights to notice of and to take part in NRAB hearings. Critical to this case and *Cole* is the fact that *Burley (I)* arose out of the interplay of those individual employee rights with the authority of his union to act for him. This court there concluded that, except to the extent the employee had authorized his union to act for him, he was entitled to handle his

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[9] S. Rep. 1201, 89th Cong., 2nd Sess. (1966) Code Cong. & Admin. News, p. 2286.

[10] *Ibid*.

own case in his own way. This was the law in 1966 and remains so to this day. Thus, if Section 153 First (j) is to be imported into the public law board proceedings, as the Sixth Circuit has ruled here and in *Cole*, then by definition so is *Burley (I)* along with its subordination of union authority to the employee's right to handle his own case in his own way.

Clearly Congress did not so intend. It specifically stated that the merits of each claim should be considered prior to submission to a public law board. This congressionally contemplated screening process without question implies that the employee's union has the authority *not* to submit his claim at all. Put another way, the screening process implies union authority to deny the employee himself any access to a public law board since the union, and not its member, may cause the convening of a board. Put still another way, the screening process beyond cavil implies that the union member is entitled to no say in his union's decision not to submit his claim to a public law board.

There is yet another implication from the screening process. Since his union can deny the employee any access to a board, by the same token, it can decide the manner in which the claim is submitted to the board; for should the employee disagree with his union's approach, the screening process implies that the union has the authority then to refuse to submit the claim at all.

Taken together, the consequences of these implications from the screening process are on their face inconsistent with, if not repugnant to, the *Burley (I)*

bundle of rights arising from Section 153 First (j). For as this court observed:

> "In the view we take the Act guarantees to the aggrieved employee more than merely the right to be heard by the union and the carrier.
>
> * * * *
>
> "His rights, to share in the negotiations, to be heard before the Board, to have notice, and to bring the enforcement suit, would become rights more of shadow than of substance *if the union*, by coming to agreement with the carrier, *could foreclose his claim altogether at the threshold of the statutory procedure*. This would be true in any case where the employee's ideas of appropriate settlement might differ from the union's." *Burley (I)*, 325 US at 736. (emphasis added)

But, as we have demonstrated, the union *can* foreclose *access* by the employee to a public law board, and such being the case, and it being the express intent of Congress that the public law boards expeditiously process their cases, it follows that Congress intended to restrict *Burley (I)* rights and the impedimenta consequent upon their exercise to the Adjustment Board milieu, and not to import them wholesale into the public law board arena. The two forums, we submit, are therefore not congruent and the Sixth Circuit, here and in *Cole*, erred in implicitly equating them.

This is not to say that the 1966 amendatory legislation was intended to overrule *Burley (I)* and by that token vest the union with czar-like power over its member's

claim. To the contrary, *Burley (I)* clearly forbids a union from convening a public law board against the express wishes of its member who may desire to exercise his *Burley (I)* rights and thus to take his case to the Adjustment Board. And, of course, that employee's union still cannot compromise his claim without authority. And it surely follows that *Burley (I)* accords the employee the right, even after his case has been submitted to a public law board, to revoke his union's authority and thus to take his claim to the Adjustment Board. But the 1966 amendatory legislation, given the expression of congressional intent gleaned from the legislative history, was meant, first, to exclude employee participation in the new public law board process and, therefore, to empower his union to act for him through to conclusion.

To be sure, the employee is entitled to have his claim presented to the public law board in proper fashion and to be represented adequately. Again, however, the 1966 amendatory legislation, given the intent of Congress that the process be expeditious, meant to impose the duty to protect those rights on the union, and not the public law board, Were it not so, the integrity of the new mechanism is impeached and the intent of Congress goes unfulfilled. Surely Congress was aware of the ramifications of *Burley (I)* when it excluded employee participation in the public law board process. Thus, it must have recognized that the union's authority over its member's claims once in the public law board process would be enhanced, and that abuse of that authority was possible. However, Congress intended the process to be expeditious, a goal that

cannot be achieved if there is a duty to protect against abuse of union authority on the part of the public law board in cases, such as here and in *Cole*, where there is nothing to indicate that the union is acting contrary to the wishes of its employee. A claim cannot be expeditiously processed if, as in the Adjustment Board setting, the employee is in each case entitled to be present when the Board meets, and then and there to add to, change or disagree with his union's submission of facts, interpretation of applicable agreements, and arguments or else an award unfavorable to the employee can be upset. We think it clear that Congress, given the legislative history and the ramifications flowing from it, concluded that railroad unions could be trusted not to abuse their authority before a public law board, and that in isolated instances of abuse, the now well-developed doctrine of fair union representation is available to recompense the employee. See *Pyzynski* v *New York Central RR Co*, 421 F2d 854, 862 (2nd Cir, 1970).

The facts of the case below dramatically demonstrate the error of the Sixth Circuit in its attempt to discern the intent of Congress. Appellee here desired to be present when the public law board met.

> ". . . I asked him to let me know when the Board would convene so I would have a chance to defend myself, because I knew that transcript better than anybody else did and I would be able to enlighten the board to bring out contradictory statements, lies, that would certainly enhance my chances of getting back, proving my innocence." (50a)

There is no claim, as there was in *Cole*, that appellee was given wrong advice by the union, nor was there any evidence, as there was in *Cole*, that appellee did not understand the workings of the Board. There is no claim that the union failed adequately to present the case. To the contrary of *Cole*, appellee here, one can only gather, thought he could have done a better, more forceful job than his union, a not uncommon complaint of a losing party to any manner of case, but certainly not a complaint of prejudice. LaFontaine, then, extends *Cole* and its importation of *Burley (I)* employee rights from cases involving prejudice from union misfeasance at the public law board level to those in which union mishandling is absent and in which the only prejudice is in the result. Clearly, this cannot be what Congress had in mind in 1966 when it established an alternative mechanism to be utilized by unions for the expeditious processing of employee claims.

The National Mediation Board, charged with administration of the 1966 amendatory legislation, has taken note of *Cole* and has characterized its reach:

> "The sixth circuit's decision in *Cole* v *Erie Lackawanna Ry.*, supra, not only substantially broadened the meaning of 'due notice' under section 3, first (j) of the act, it also held the section and all of the rights it contains applicable to public law board proceedings. *Previously, section 3, first (j) only had been held to apply to proceedings of the National Railroad Adjustment Board.*" Forty-Second Annual Report, *supra*, n. 4, p. 25 (emphasis added).

We respectfully submit that the Sixth Circuit has grossly misread the intent of Congress and that, in so doing, it has jeopardized the validity of hundreds of public law board awards, and compromised the public law board as a mechanism for resolving employee claims.

Even if our construction of the 1966 amendatory legislation is in the end mistaken in whole or in part, we suggest the matter of employee rights in the public law board process and the question whose duty it is to protect them should at last be decided by this Court because it is too important to the proper functioning of the Railway Labor Act to be left standing as it is now.

C. The order of the Sixth Circuit below, in tandem with Cole v Erie-Lackawanna Ry Co, supra, misapplies this Court's opinion in Burley v Elgin, E. J. & E. R. Co, (I), supra and is therefore in conflict with a decision of the Seventh Circuit.

In the preceding section of this petition, we demonstrated the error of the Sixth Circuit here, and in *Cole*, in importing wholesale into the public law board mechanism the employee rights enunciated by this Court in *Burley (I)*. This section of our petition, however, proceeds on the assumption, arguendo, that our position there is wrong and that, thus, *Burley (I)* does apply in the public law board process to the same extent it applies to the National Railroad Adjustment Board mechanism. Even so, the Sixth Circuit here and in *Cole* misinterpreted *Burley (I)* and thus its order here is in conflict with a decision of the Seventh Circuit.

After release of its opinion in *Burley (I)*, this Court, upon rehearing, considered the nature of the notice which *Burley (I)* required to be given an employee to permit him to protect his rights in connection with disposition of his grievance and, in addition, took up the question of the extent to which his union might be authorized to act for him in that regard, *Elgin, J & E R Co* v *Burley*, 327 US 661 (1946) (II). There this Court recognized that, in the Adjustment Board setting, the union's authority to act on behalf of the employee is entitled to "presumptive weight," 327 US at 664, and indicated that such authority could be conferred by the constitution of the union organization of which the employee was a member, 327 US at 665, n. 2. Having ruled on the presumption in favor of the union's authority, this Court cautioned that:

> ". . . [W]e did not rule, and there is no basis for assuming we did, that an employee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the Board on their submission, allow matters to be thrashed out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights." 327 US at 666, 667 (emphasis supplied).

This Court, however, declined to define what was meant by "due notice":

> "But we did not undertake to define what was meant by 'due notice,' nor do we now. 'Due notice' conceivably could be given or had in a variety of forms, more especially when account is taken of the generally informal procedure of the Board. It would require at the least, we think, knowledge on the aggrieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency." 327 US at 666, n. 9.

Both in the case below and in *Cole*, the Sixth Circuit construed *Burley II* "due notice" to mean:

> "Actual notice for this purpose is notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." Appendix, p. A2; 541 F2d at 534.

Such a statement of "due notice," cast as it is in terms of *when* the notice must be given or had, is perplexing, if not incongruous, in the factual context here and in *Cole* because, although no formal notice was given in either case, each employee in fact knew early on that his claim was before a public law board. Therefore the message apparently intended to be conveyed by the quoted sentence is that public law boards must furnish each employee notice not only of "pendency of the proceedings," but even beyond that, some instruction in the workings of the public law board and of his right to revoke the authority of his union thus permitting him to handle his own case in his own way.[11]

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[11] See the *Cole* court's reference that Cole "did not understand the workings of Board" [541 F2d at 535] and that Cole "was foreclosed from making the very decision [to represent himself or to be represented by counsel or by union representatives] which § 9 First (j) empowers him to make; thus, his failure to act affirmatively cannot be held to have been a waiver of his right." 541 F2d at 535, 536.

We respectfully submit that neither *Burley* case supports such a construction of the "due notice" provided for in Section 153 First (j), and, indeed, such a construction is contrary to *Burley (I)* and *(II)*. For what the Sixth Circuit lost sight of is that *Burley (I)* and *(II)*, although defining employee rights, involved the larger — much larger — question, namely to what extent and under what circumstances are such employee's rights waived or lost when his union undertakes to represent him and during such representation. *Burley* (II) made it clear that if the union had authority at the outset to handle the employee's grievance then, without regard to lack of notice from the Adjustment Board, the employee must take action to revoke such authority or be bound by the end result. Of this there can be no doubt, for in remanding for further proceedings, this Court in *Burley* (I) stated:

> "Since upon the total situation we cannot say as a matter of law that respondents had authorized the Brotherhood to act for them in Docket No. 7324, whether in submitting the cause or in representing them before the Board; since it is conceded also that they were not given notice of the proceedings otherwise than as the union had knowledge of them; and since further they have denied that they had knowledge of the proceedings and of the award until after it was entered, the question whether the award was effective in any manner to affect their rights must be determined in the further proceedings which are required. *The crucial issue in this respect, of course, will be initially whether respondents had authorized the Brotherhood in any legally sufficient manner to represent them, individually, in the Board's proceedings in Docket No. 7324.*" 325 US at 748 (emphasis supplied).

Neither *Burley* case required or compelled the Adjustment Board to notify the employee of anything other than that his claim had been submitted, nor did it cast the Adjustment Board in the role of the protector of the employee's right to represent himself or to be represented by counsel rather than by his union, as the Sixth Circuit has done here and in *Cole*.

The view of the Sixth Circuit necessarily proceeds from its erroneous and unjust assumption that the union may not or cannot or should not be trusted to deal fairly with its members, and that the Adjustment Board therefore ought in each case to undertake in effect to see that it does so. Surely, no support for such an assumption can be found in either *Burley* case; to the contrary, the presumption in favor of union authority to represent its member presupposes that the union will act responsibly.

Furthermore, the Adjustment Board has never been held to have any authority to act on employee claims of union misbehavior because Section 153 First (i) limits the Adjustment Board's jurisdiction to disputes between railroads and employees and because the union members on the Adjustment Board would be presumably hostile in a union-member dispute.[12] If the Adjustment Board lacks authority to intrude into the union-member relationship to redress a member's grievance, then by parity of reasoning it would be unseemly to compel it to intrude into the very same relationship for the purpose of advising the employee of his right to revoke the union's authority to

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[12] See, e.g., *Steele* v *Louisville & N R*, 323 US 192 (1944); *Conley* v *Gibson*, 353 US 41 (1957); *Glover* v *St. Louis & S.F. R*, 393 US 324 (1969).

represent him or otherwise to undertake to advise him of the rights his union is duty-bound to protect.[13]

Imposition on the public law board of a duty to notify (or perhaps "warn" is a more accurate word), implies as well a duty to make certain that the notification is effective. Discharge of that correlative duty could be achieved only if the public law board, as well as ruling on the merits, were also required to conduct an inquiry into the reason for an employee's failure to participate in his case wherever and whenever only his union was heard from. Since it can be safely assumed that the union will not impeach before the Board its authority to act for its member nor that the railroad will idly stand by if possessed of knowledge that the union lacks authority, something more than employee silence or representations from his union, is required — perhaps something in writing from, or perhaps face-to-face board communication with the employee himself — followed by a finding by the Board that the union has or has not full authority to act. Whatever form independent[14] board inquiry may take,

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[13] Since a railroad is required to have representation on either an Adjustment Board or a Public Law Board, a railroad, which is in an adversary position to the employee, would perforce be compelled to insert itself into the employee's relationship with his union, an intrusion which, in any other context, is illegal. See 49 USC § 152, Third and Fourth.

[14] Because the vote of any two members of a public law board governs, it is entirely possible that the railroad and union board member could make a valid and non-reviewable finding of authority over the dissent of the neutral member. This anomalous result is yet another reason why such matters were not intended to be entrusted to any Board, and further indication of the extent of the Sixth Circuit's error in implicitly so holding.

the consequent fact-finding of union authority *vel non* launches the board improperly into resolution of union-member disputes, for an adjudication that no authority dispute exists [i.e., the employee agrees that the union has authority to act] is as much an exercise of Board jurisdiction as the contrary finding that a dispute exists and the resolving of it [i.e., the union, despite its claim to the contrary, lacks authority to act].[15] And that, as we understand the holdings of this Court, is impermissible.

We suppose it once might have been said that *Cole* is factually unique so that only where the employee's union imparts advice that effectively deprives him of his rights before an Adjustment Board or public law board, can an otherwise valid award be set aside.[16] The case below, however, now makes it clear that the Sixth Circuit intends *Cole* to have broad applicability.

In *LaFontaine*, the employee wished to be present at the meeting of the public law board so that he could assist the union in presenting his case. Although the union apparently promised to advise him about the meeting, it did not do so and, of course, no formal

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[15] Compare the juristic similarity to the jurisdiction of a court to determine that it lacks in personam jurisdiction: such a decision is binding on the parties and is, of course, a "decision," notwithstanding that the court, by its own ruling, concluded that it lacked jurisdiction in the first instance. 20 Am Jur 2d, *Courts*, § 92.

[16] Perhaps the narrow factual context was one reason why this Court denied certiorari in *Cole* 433 U.S. 914 (1977) notwithstanding that the Solicitor General urged that the writ be granted and that the Sixth Circuit be reversed.

notice was given by the Board. LaFontaine, however, was aware that his case was before the Board and that his union was processing it on his behalf. By virtue of his union's constitution, the United Transportation Union was granted not only complete authority to act in its member's behalf to submit claims and grievances to any tribunal unless the member serves the union with reasonable written notice to the contrary, but also authority

> ". . . to receive notice of hearings, or to waive hearing, and to appear for, represent, and act for its members before any person, board, or other tribunal in connection with consideration and determination of claims, complaints, or grievances." (54a)

The public law board specifically found that "due notice of hearing" was given the union, (8a). There is not a scintilla of evidence that LaFontaine was misadvised of his *Burley (I)* rights. There is no claim that LaFontaine's case was not properly handled by his union before the Public Law Board nor is there any claim that LaFontaine had any evidence known only to him that was not communicated to his union or by his union to the board. There is no evidence that LaFontaine did not wish his union to continue to represent him or that he told either the Board or the railroad of his desire to be present, and there is no evidence that he did not understand the workings of the Board. Yet on these facts, the Sixth Circuit ruled:

> ". . . In *Cole* v *Erie Lackawanna Railway Co.*, 541 F.2d 528 (1976), cert. denied, 433 U.S. 914 (1977), this court held that actual notice of a

> hearing is required 'for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim.' We conclude that the quoted language is dispositive of this appeal." Appendix, p. A2.

Thus, although no prejudice arising from the Board's failure to give formal notice to LaFontaine was or could be shown, the Sixth Circuit rigidly and summarily applied *Cole*. It can no longer be thought that *Cole* is limited to its facts and other situations involving prejudice to the employee. *Cole* now applies to every case pending before a public law board. Such a result is contrary to both *Burley* cases because it completely ignores the presumption of unrevoked union authority to act on its employee's behalf and permits the employee to sit idly by until an adverse award is rendered, coming in then for the first time to assert his rights.

To the contrary of the Sixth Circuit's order below is *Kotakis* v *Elgin, J & E R*, 520 F2d 570 (7th Cir), cert. den. 423 US 1016 (1975), involving the review of an award of the Adjustment Board. There, Kotakis' discharge case was handled by his union from the beginning through to an unfavorable result before the Adjustment Board. Kotakis then filed an action in district court seeking review of the award; following dismissal of his lawsuit as it related to review of the award, Kotakis appealed to the Seventh Circuit, urging as one ground, failure of the Adjustment Board to give him notice pursuant to Section 153, First (j). The Seventh Circuit observed that the notice issue, having been neither pleaded nor

argued in the district court, was not properly before it, but nevertheless considered the issue:

> "Moreover, the record discloses that plaintiff knew his grievance had been submitted to the Adjustment Board and that he had authorized the union to represent him there. That satisfies the notice requirement. *Elgin, Joliet & Eastern Railway Co.* v. *Burley*, 327 U.S. 661, 666-667, 66 S.Ct. 721, 90 L.Ed. 928." 520 F2d at 576.

Although Kotakis, unlike LaFontaine, did not take the position that notice was required because he wished to be present,[17] nevertheless the result below and the holding in *Kotakis* are in conflict for in neither case is any prejudice alleged or shown, and in both cases the employee's union had unrevoked authority to act in his behalf, including the authority to receive notice.

The National Mediation Board itself recently took note of the appearance of a conflict between *Cole* and *Kotakis*:

> "The issue of whether, absent official notice from an adjustment board, a claimant has received 'due notice' as provided in section 3, first (j) of the act, 45 U.S.C. § 3, first (j), was dealt with by two courts of appeal during the period covered by this report. The seventh circuit in the *Kotakis* case, supra, found sufficient

[17] We note in passing that it is exceedingly doubtful that LaFontaine had any right to demand to be present so long as his union's authority to act had not been revoked, for Section 153 First (j) provides that parties may be *"heard either* in person, by counsel, *or* by other representatives, as they may *respectively elect. . . ."* (emphasis supplied.)

> notice upon the simple showing that a claimant had authorized his collective bargaining representative to represent him before the Adjustment Board with respect to his grievance and knew that his grievance had been submitted to the Board. However, in *Cole* v *Erie Lackawanna Ry.*, 541 F.2d 528, (6 Cir. 1976), cert. denied, — U.S. — (1977) the sixth circuit found such knowledge and authorization insufficient notice within the meaning of section 3, first (j) where the claimant had been informed by his representative that he need not bring witnesses to the hearing on his claim and that he could not appear at the hearing." Forty-Second Annual Report, supra, p. 24.

We have no doubt that the Mediation Board would at the very least be of the same opinion as to the ruling and result below.

For these reasons, we submit that the ruling below, in tandem with *Cole*, misconstrues and is contrary to *Burley (I)* and *(II)* and thus is in conflict with *Kotakis*. However, even if we are mistaken in whole or in part, the matter is far more significant than merely whether a public law board ought to take the time to mail something to an employee or be denied the power to enter a binding award, because inextricably drawn into question is the extent to which a union currently has authority to act, and the correlative question how far beyond the mere giving of notice a public law board is obliged to go in protecting an employee's *Burley* rights. The ruling below, extending *Cole* to all public law board cases at the very least raises these questions and disposes of them without any consideration of them or

of the implicit effects of the ruling on them. The matter of the interplay of union authority before a public law board with protection of employee rights, goes to the very essence of the integrity of the public law board process. Whether or not our position is correct in the end is immaterial. For these matters are far too important to the administration of the Railway Labor Act to be left standing as they are now.

D. Conclusion

The clear import of the ruling of the Sixth Circuit below is to extend the holding in *Cole* to any and every case submitted to a public law board so that, if notice is not given by the Board to the employee, the otherwise valid award may be set aside upon his motion, for that reason, and that reason alone without regard to prejudice. In part B of our argument, we have marshalled the reasons why Congress did not intend that the provisions of Section 153 First (j) apply to public law boards, and in part C we demonstrated that, even if that section were applicable to public law boards, notice of hearing to the union was satisfactory in the absence of some reason for the Board to believe that the union had something less than full authority to act on behalf of its member.

At the time this Court was considering whether to hear *Cole*, a case involving prejudice resulting to an employee who had not received notice of hearing, this case in which no prejudice for lack of notice was alleged or proved, was pending before the Sixth Cirtuit. After this Court declined to review *Cole*, the Sixth Circuit, relying strictly upon its decision there and this Court's denial of certiorari, summarily affirmed the lower court, and in so doing, extended *Cole* from cases involving prejudice from lack of notice to all cases. We submit that whatever may have then been this Court's reasons for declining to hear *Cole*, the ruling below requires a fresh review by this Court now in a setting much more appropriate for consideration of the important question of the interplay of employee rights under *Burley (I)* and their protection with union authority to act on behalf of its members in the context of the new public law board mechanism.[18]

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[18] We have not mentioned the burden, let alone unfairness to an employer like the railroad here, innocent of knowledge of some violation by the union of an employee's *Burley (I)* rights, in the public law board arena, of the result reached below, because we think it goes without saying.

For the reasons stated in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 24, 1978

APPENDIX

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed June 1, 1978)

(Robert LaFontaine, Plaintiff-Appellee, v The Chesapeake and Ohio Railway Company, Defendant-Appellant. No. 76-2491)

BEFORE: LIVELY and MERRITT, Circuit Judges; and RUBIN,* District Judge.

No judge in regular active service on the court having requested consideration en banc, the petition for rehearing filed herein by the defendant-appellant has been referred to the panel which heard the appeal.

Upon careful consideration of the petition for rehearing the court concludes that the arguments contained therein were fully considered upon the original submission and decision of the appeal.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

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*The Honorable Carl B. Rubin, Judge, U. S. District Court for the Southern District of Ohio, sitting by designation.

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed April 18, 1978)

(Robert LaFontaine, Plaintiff-Appellee, v Chesapeake and Ohio Railroad Company, Defendant-Appellant. No. 76-2491)

BEFORE: LIVELY and MERRITT, Circuit Judges; and RUBIN, District Judge.*

The sole issue in this case is whether an employee on whose behalf a union had submitted a claim of wrongful discharge to a Public Law Board created pursuant to the Railway Labor Act was entitled to actual notice of the hearing before the Public Law Board. In *Cole v. Erie Lackawana Railway Co.*, 541 F.2d 528 (1976), cert. denied, 433 U.S. 914 (1977), this court held that actual notice of a hearing is required "for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." We conclude that the quoted language is dispositive of this appeal.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

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*The Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

ORDER REMANDING CASE TO PUBLIC LAW BOARD

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed April 30, 1976)

(Robert LaFontaine, Plaintiff, v The Chesapeake and Ohio Railway Company, Defendant. No. 74-71397)

At a session of said Court held in the U.S. District Court, Detroit, Michigan on April 19, 1976

PRESENT: HONORABLE James P. Churchill
U. S. District Judge

This matter having come on to be heard upon motion of the Plaintiff and the Court being fully informed in the premises;

IT IS HEREBY ORDERED that the decision of the Public Law Board 347 upholding Plaintiff's discharge be set aside and that this matter be remanded to said Public Law Board for rehearing on the merits.

Honorable /s/ Fred W. Kaess
U. S. District Judge

For Judge James P. Churchill

ORDER GRANTING IN PART AND CONDITIONALLY DENYING IN PART MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF RIGHT TO AMEND COMPLAINT

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed February 13, 1975)

(Robert LaFontaine, Plaintiff, v The Chesapeake and Ohio Railway Company, Defendant. No. 74-71397)

At a session of said court held in the Federal Building and U.S. Courthouse, Detroit, Michigan, on Feb. 11, 1975

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge

IT IS HEREBY ORDERED that the defendant's motion for summary judgment filed in the above-entitled matter be and hereby is granted in part and conditionally denied in part, and that the plaintiff be and hereby is granted leave to file an amended complaint as set forth in the Court's Memorandum Opinion; for the reasons set forth in a Memorandum Opinion of the Court entered on this date.

/s/ James P. Churchill
United States District Judge

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed February 13, 1975)

(Robert LaFontaine, Plaintiff, v The Chesapeake and Ohio Railway Company, Defendant. No. 74-71397)

This is an action for review of an award made by a special grievance board following the firing of a railroad employee for assaulting another employee. The petition alleges that plaintiff was employed as a yardman in Detroit by defendant railroad. On April 26, 1971, he was involved in an altercation with a fellow employee, J. H. Flatt. Pursuant to railroad procedure, a hearing was held before the trainmaster shortly thereafter; plaintiff was found to be at fault and was discharged from service. A claim for back pay and reinstatement was taken before the Public Law Board #347 pursuant to procedure agreed to by defendant and plaintiff's collective bargaining representative, the United Transportation Union. The claim was denied on January 19, 1973.

Plaintiff prays that he be ordered reinstated with back pay, or in the alternative, that the Board's decision be vacated and the matter be remanded for a new hearing. The asserted basis for such relief is that the original hearing was procedurally unfair because the same

union representative served both plaintiff and J. H. Flatt at the trainmaster's hearing; that the Public Law Board hearing was unfair in that the transcript of the earlier hearing should not have been relied upon by the Public Board because the trainmaster's hearing had been conducted in total disregard of the rules of evidence; and in that the plaintiff here did not receive proper notice of the hearing. This last claim was raised only in plaintiff's brief; it does not appear in his complaint.

The defendant railroad has moved for summary judgment alleging lack of jurisdiction over the subject matter as well as failure to state a cause of action. These are both defenses which can be raised by motion to dismiss under [2] Rule 12(b), F.R.C.P. The Court will construe this motion for summary judgment as a motion to dismiss under Rule 12(b)(1) and 12(b)(6).

Defendant claims that jurisdiction to review awards of Special Adjustment Boards does not lie in the district courts. In *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), it was held that:

> "A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. Union Pacific R. Co. v. Price, 360 U.S. 601 (1959)." 406 U.S. at 325.

To some extent that principal [sic] is modified by the terms of the statute under which Special Boards are created. 45 U.S.C. Section 153 provides for jurisdiction in the district court to enforce awards of such boards. The terms of awards may be set aside under the statute only if a party alleges that the order exceeds the

scope of the Board's jurisdiction, that the Board failed to comply with statutory requirements, or for fraud or corruption by a member of the Board.

This suit is not for enforcement of an order; nor does it allege any of the three grounds which would put it properly before a district court if enforcement were the issue. Rather, the suit is to set aside an order because of procedural irregularities at both the trainmaster's hearing and the hearing before the Special Board. The statute does not authorize review for those purposes. There is, however, case law authority for review of Special Board decisions where they are tainted by due process violations. The Seventh Circuit has held:

> "The sound conclusion to be drawn from the statute (the Railway Labor Act) and the various decisions, seems to be that, *in the absence of any question as to the regularity of proceedings before the board* for lack of notice or other defect preventing due process of law, the district court has no right to review an order of the board." *Ellerd v. Southern Pacific R. Co.*, 241 F.2d 541 (CA7 1957). (Emphasis supplied.)

Thus, the defendant's position that review is unavailable is not necessarily valid if the plaintiff has alleged a denial of due process in the hearing procedure.

In *Edwards v. St. Louis-S.F. RR Co.*, 361 F.2d 946 (CA7 1966), it was held that only in cases where the alleged denial of due process occurred before the Public Law Board would jurisdiction lie with the district court for review. If the alleged due process violation occurred at the initial trainmaster's hearing on the railroad property, the district court lacks jurisdiction to review

the award. This district has recently adopted the holding of the *Edwards* case in an opinion by Judge Gubow in the case of *Richard Wenzel v. Chesapeake & Ohio Railway Co. et al.*, Civil Action 74-71578, decided December 23, 1974.

[3] Therefore, the motion to dismiss will be granted with respect to all claims raised by the plaintiff except the issue of the adequacy of the notice to plaintiff of the Special Board hearing. District courts lack jurisdiction over the subject matter of those claims which are here dismissed. This is not to say that the allegations of unfairness at the trainmaster's hearing would be foreclosed should this Court remand for a rehearing by the Special Board on the grounds of lack of due notice. Under the terms of paragraph 8 of the agreement between the railroad and the union establishing the Special Board, each party to a claim before such Board may present evidence and statements of fact at the hearing before the Board. The issue of fairness of representation and the use of the trainmaster's hearing transcript can properly be raised at such a hearing.

Heretofore, that claim of lack of notice has only been raised in plaintiff's brief. The Court hereby grants plaintiff leave to file an amended complaint to include such a claim. If the amendment is filed within twenty (20) days of the date of filing of this order, the order granting the motion to dismiss as to the notice claim will be denied. If no such amendment is filed within such time, the motion to dismiss will be granted.

/s/ James P. Churchill
United States District Judge

Dated: February 11, 1975

Supreme Court, U. S.
FILED
OCT 11 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

No. 78-335

vs.

ROBERT LAFONTAINE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

vs.

ROBERT LAFONTAINE,
Respondent.

No. 78-335

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, The Chesapeake & Ohio Railway Company, Defendant below, petitioned this Court for a writ of certiorari in the above-titled matter on August 24, 1978. This is respondent's Robert LaFontaine, brief in opposition to said petition.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

First, whether the notice provision of 45 USC 153 (First) (j) applies to a Public Law Board convened pursuant to 45 USC 153 (Second)?

Respondent contends the answer is yes, and further, that no reason exists to grant certiorari over this issue.

Second, assuming said notice provisions do apply to Public Law Boards, did respondent herein receive sufficient notice when he specifically requested to appear to represent himself and present witnesses, was not given actual notice of hearing, if any was held, and was prejudiced by said failure to notify?

Respondent answers no and states further that there is no reason to grant certiorari, herein.

STATUTORY PROVISION INVOLVED

Aside from those mentioned in petitioner's brief, respondent cites 45 USC 153 (Second) included in the appendix.

STATEMENT OF THE CASE

This case arises under the Railway Labor Act's provisions for settling minor disputes. 45 USC 153, (First) and (Second).

On April 26, 1971, respondent was stabbed by one Jesse Flatt while working at petitioner. Both respondent and Flatt were employees of petitioner. Respondent spent two months in the hospital as a result of said attack.

Petitioner discharged both Flatt and respondent, while respondent was hospitalized. Both men protested, claiming the other was the aggressor.

In accordance with the collective bargaining agreement a grievance hearing ("investigation") was held by the trainmaster on June 22, 1971. These hearings are required in all discipline cases and are conducted before a stenographer who transcribes the proceedings.

The investigation conducted in the respondent's case involved the discharges of both respondent and his assailant, Flatt. In fact, the same Union representative represented both LaFontaine and Flatt at the hearing. (4a, 21a, 49a, 50a, 57a)* Mr. Lewis who was a friend of Flatt's, introduced witnesses prejudicial to respondent. Following these witnesses, respondent discharged Lewis and sought to represent himself. (21a, 49a, 57a) The respondent sought a continuance to better prepare his case, and to introduce his own witnesses. His request was denied.

Respondent then asked Mr. Wojtaszak, General Chairman, United Transportation Union, to submit his case to the appropriate board, and insisted that the irregularities at the investigation be included in his appeal. (58a) Thereafter respondent asked Wojtaszak several times to inform him when the hearing before the Public Law Board would be heard so that he could present his own case. (48a, 49a) Mr. Wojtaszak promised that notice would be given. (48a) It is uncontradicted that respondent never received notice. (46a, 49a, 50a)

The Union's submission to the Board was based on the investigation transcript, but did not challenge the fairness of the investigation or the Union's conduct, as respondent had wished to do. (17a, 21a)

On December 14, 1971, Mr. Flatt was convicted of felonious assault in the State of Michigan's Circuit Court for Wayne County. (*People* v *Jesse Flatt,* unreported)

Following the Board's Award of January 23, 1972, upholding his discharge respondent filed this cause.

Petitioner states, at page 6 of its brief, that:

> "Plaintiff authorized his union United Transportation Union) to handle the appeal to Public Law Board

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* Numbers in parentheses followed by the letter "a" refer to the joint appendix filed with the 6th Circuit.

347, and was aware of the fact that L. J. Wojtaszak, General Chairman, UTU, was handling the appeal of Plaintiff's grievance to Public Law Board 347."

Petitioner goes on to say that Article 44 of the UTU Constitution authorized the Union to act on respondent's behalf, and that said authority was never revoked. Petitioner's brief at page 7 (see also Page 8). In fact, Respondent did not authorize the UTU to act for him. He told Mr. Wojtaszak he wanted to appear to present his case to the PLB, and Wojtaszak agreed to such a procedure. Respondent did revoke the UTU's authority, if such authority ever existed. In fact, respondent dismissed his Union representative. Petitioner's conclusory statements that the UTU was authorized are not supported by the record. In fact, the Union was not so authorized.

ARGUMENT

A. This Petition amounts to a collateral attack on *Cole* v *Erie-Lackawanna Ry.*, F2d (6th Cir., 1976) for which cert. has already been denied.

This Court denied certiorari in *Cole, supra* at 433 US 914 (1977). It is clear from Petitioner's brief that the present petition for certiorari is little more than a belated attack on *Cole*. While a denial of the writ is not an expression on the merits, *US* v *Shubert*, 348 US 222 (1955), it is an expression that fewer than four members of the Court felt certiorari should be granted. *State of Maryland* v *Baltimore Radio Show*, 338 US 912 (1950). While said denials are discretionary, *Durham* v *US*, 401 US 481 (1971), Supreme Court Rule 19(b) sets forth the factors the Court weighs in considering a petition. Those factors are whether the circuits are in conflict; whether a circuit opinion conflicts with this Court; whether the issue is so important that the Court should review it; whether the circuit conflicts with state or territorial law; or whether this court should exercise its supervisory powers. In *Cole*, this Court already decided that the petition does not meet these criteria. While it is not a decision on the merits, it does suggest certiorari is improper.

Petitioner has failed to advance any reasons why the present petition is more meritorious than the petition in *Cole*. In fact, Petitioner has basically argued in the introduction to its brief in support of the instant petition that it is the *Cole* case which presents an issue of such importance as to warrant certiorari. Respondent can discern no other reason advanced by Petitioner as to why the instant petition should be granted.

B. 45 USC 153 (First)(j) is applicable to cases presented to Public Law Boards.

Petitioner's basic thrust in its petition is to reverse the decision of the Sixth Circuit in *Cole* v *Erie-Lackawanna Ry. Co.*, 541 F2d 528 (1976), which held that "Section 153 (First)(j) applies to proceedings before Special Adjustment Boards" *supra* at 533.

This section of the Act provides that employees have the right to appear before the NRAB in person or by their representative and to receive notice of the hearing. *Elgin J & E* v *Burley*, 325 US 711, 736-741 (1945 — hereinafter referred to as *Burley I*).

Petitioner seeks nothing less than to exclude employees from hearings before the Special Adjustment Boards. Petitioner argues that 45 USC 153 (second) that created the special adjustment boards made the unions the sole and

exclusive representative of employees in cases before these boards. *Petitioner's Brief,* pp. 16 and 18.

Admittedly, Petitioner has argued that under the facts of this particular case, the notice provided the union satisfied 45 USC §153 (First)(j) and *Elgin J & E Ry.* v *Burley,* 327 U.S. 661 (1946) (hereinafter *Burley II*). However, this argument is clearly secondary to its central thrust; i.e., to make the Union the sole and exclusive representative of employees in cases before the Public Law Boards or Special Adjustment Boards.

This argument is clearly unfounded. Petitioner's interpretation of the purpose and nature of the Public Law Boards can find no support in judicial authority nor in logic. Clearly as stated above, this petition does not warrant the grant of certiorari. In fact, the *Burley (I)* Court, *supra* at 722-734, notes that Congress decided that the Union is not the exclusive representative for employees in minor disputes in the Railroad industry. Thus Petitioner presents an issue clearly laid to rest in 1945.

The Public Law Boards were established by the 1966 Amendments to the Railway Labor Act. The legislative history clearly indicates that judicial review of NRAB and PLB decisions is identical, and includes review of the statutory requirements. That history says:

> "The bill provides for the establishment, upon the request of a representative of management or of labor, of special boards for the settlement of disputes arising under collective bargaining agreements in the railroad industry. The bill also provides that judicial review of orders of the National Railroad Adjustment Board, and of boards established under this legislation, relating to minor disputes in the railroad industry would be available to either party but limited to the determination of questions traditionally involved in arbitration legislation — whether the tribunal had jurisdiction of the subject, whether the statutory requirements were complied with, and whether there was fraud or corruption on the part of a member of the tribunal."
>
> P.L. 89-456, Leg. Hist., 1966 USCCAN 2285 at 2289.

The holding in *Cole, supra* is supported by this history; for an award of the NRAB is enforcible only if the procedural safeguard of notice was followed. 45 USC 153 (First)(j); *Elgin J & E Ry.* v *Burley,* 325 US 711, 738 (1945) (hereinafter *Burley I*); *Elgin J & E Ry.* v *Burley,* 327 US 661 (1946) (hereinafter *Burley II*).

Other case law also supports this position. Several Courts have held that the Court's jurisdiction to review an award of a PLB is identical to its jurisdiction to review an NRAB award. *Brotherhood of Locomotive Engineers* v *Denver & Rio Grande Ry.,* 411 F2d 1115 (10th Cir., 1969); *Transportation-Communication Div.* v *St. Louis & S. F. Ry.,* 419 F2d 933 (8th Cir., 1969), cert. denied, 400 US 818 (1970); *Employees Protective Assn.* v *N. & W. Ry.,* 511 F2d 1040 (4th Cir., 1975); *UTU* v *Indiana HBR Co.,* 540 F2d 861 (7th Cir., 1976); *Cole, supra.*

Furthermore, the NRAB is a compulsory arbitration scheme. *BRT* v *Chic. River & Ind. Ry. Co.,* 353 US 30, 77 S. Ct. 635 (1957). The same is true of a PLB. It is only proper then, that Courts apply the same standard of review in both forums.

The legislative history, and case law are clear. The Section 153 (First)(j) right to notice and appearance applies to a PLB in the same manner and to the same extent that they apply in cases heard by the NRAB.

Petitioner argues that applying the notice and appearance rights to a PLB would frustrate the Congressional purpose to establish an expeditious hearing. There are several responses to this argument.

First, Petitioner's argument, if accepted as the law, gives an individual employee a choice. Either go to the NRAB where he or she may exercise the right of appearance, or agree to a PLB where he or she might get a decision faster, but without a right to appear. In short, the choice is between participation and speed. There is no indication that Congress intended such a choice. Indeed, Congress opted for both, setting up a mechanism to get a decision faster, and including judicial review which insures the right of appearance. See *infra* at p. 6-7. For this reason alone, Petitioner's argument that the Sixth Circuit misconceives the purpose of a PLB is erroneous.

In fact, the misconception is petitioner's notion that the employee's right to appear on his own behalf conflicts with the need for a swift decision. Historically, when the PLB's were added as grievance adjustment mechanisms in 1966, Congress was concerned over the backlog on the NRAB's docket. However, the notice and appearance provisions were never cited as causes of this backlog. 1966 USCCAN 285-8. In fact, very few workers chose to exercise those individual rights. *Seidenberg,* "Grievance Adjustment in the Railroad Industry," in *The R.L.A. at Fifty,* pp. 209-250 (NMB, 1977). Furthermore, Congressional concern over the NRAB backlog focused on two of the four divisions of the NRAB. The first division had a huge problem. Cases were not decided until *seven or more years* after they were filed. *Seidenberg, supra;* PL 89-456, *supra,* But the problems there were not related to notice. In fact, the second and fourth divisions operated under the notice provisions and had almost no backlog. If notice were the culprit one might expect Congress to discover that fact, and simply delete Section 153 (First)(j). Notice and appearance rights did not cause a backlog in two divisions, and were not complained of in the other divisions.

It is unlikely that the appearance right will cause such a problem today. We note that petitioner puts forward no data to show what sort of delay, if any, notice and appearance rights cause. They have not done so because their argument is mere sophistry.

The PLB's have successfully shortened the time lag from a pre-1966 seven years to one and a half years presently, despite a case load that almost tripled. *Seidenberg, supra.* This success is due to the proliferation of PLB's. There are over 450 today. *Seidenberg, supra.* Their success is also due to the National Mediation Board's docketing rules which require that a list of cases be attached to the letter requesting the establishment of a PLB. No cases may be added to the original list, and as soon as the list is completed, the PLB is dissolved. If more claims arise a new PLB is created. Thus a backlog before any one PLB is virtually impossible.

The key to this success, as petitioner has pointed out, is the right of the union to decide which cases go to the PLB. As a result, the union can screen frivolous cases. Petitioner implies that the application of §153 (First)(j) would compromise this success. This argument is simply irrational. The fact that an employee has a right to appear at a hearing cannot possibly bear any relationship to the union's right to delete frivolous cases from the PLB's dockets.

Finally, *Burley I* dealt with this time lag argument. The Court there writes:

> "If, moreover, as petitioner urges, this [Notice and participation of the individual] may make settlement less convenient than if power to deal with grievances were vested exclusively in the collective agent, that consequence may be admitted. But it cannot outweigh the considerations of equal or greater force which we think Congress has taken into account in preserving the individual workman's right to have a voice amount-

> ing to more than mere protest in the settlement of claims arising out of his employment." *Burley (I), supra,* at 740-741.

This court has clearly opted for notice, despite any delay the notice might cause. At any rate, the fear of delay is unfounded.

Petitioner also argues that since a PLB can be convened only by a Union or carrier, that somehow, it follows, that Congress meant to exclude the individual employee from the grievance process. However, Congress gives a very clear statement of its intent in giving Unions the power to convene a PLB, but not giving employees that power. Congress intended Unions to screen the claims and file only those that had some validity. 1966 USCCAN 2287. There is no indication that once the Union feels a claim is valid, and demands a PLB for it, that the employee loses his personal right to notice and participation. In fact, as stated before, the opposite is true. Congress intended Court review of PLB's to be identical to that of the NRAB. Thus the notice provision clearly applies, and the fact that the Union convened it does not remove individual rights. It would be anamalous to hold that where a Union found a claim valid and convened a PLB the employee could get no notice; whereas, if the Union found no validity and the employee went to the NRAB, Section 153 (First)(j) applies.

Either the Union or the individual grievant can appeal to the NRAB. If the Union files, the NRAB still has to protect the employee and give him notice and the right to appear. The facts in Burley were that the Union filed; yet the court required notice to the employee. If Union filing to give the NRAB jurisdiction does not destroy individual rights, then we see no reason Union convening of a PLB does so. See *Burley (I), supra* at 744, 746, n. 3. The statistics cited by petitioner are instructive. PLB's handle the vast majority of claims, today. To hold that no notice need be given by them would drastically affect an employee's statutory rights. In fact, it would repeal §153 (First)(j). *Seidenberg, supra* at 237.

Were petitioner's position that the Union may convene a PLB and then refuse to allow a claimant access, while also failing to tell claimant of his NRAB Section (j) rights, adopted, the distinction Congress has drawn between major and minor disputes would disappear. The Union would become a member's exclusive agent in both. This position is in direct conflict with the RLA and Congress's intent. *Burley (I), supra,* 722-723.

In the case at bar the need for notice to an individual is clear. The Union representative tried to represent both members. One was the assailant — Flatt. The other was innocent — LaFontaine. Yet the Union presented a case that made LaFontaine the villain, and then failed to challenge that case before the PLB despite LaFontaine's repeated demand for notice, and the opportunity to represent himself. In fact, respondent discharged his Union representative.

The Kafkaesque nature of this process is startling. Claimant had no way of knowing which of the 400 or more PLB's had docketed his case, unless the Union or PLB or carrier gave him notice. He could not contact the Judge who was to decide his case because he did not know who the Judge was. No one gave him notice. He could therefore not present the facts as he knew them. His discharge was upheld. It is at least possible, if not probable, that had he had notice and been able to represent himself, he would be back to work today. Notice is a crucial right in such a situation; and §153 (First)(j) must apply.

In fact, *Burley (I)* suggests that a Union's interest in a grievance may not always be co-extensive with the individ-

ual's. In some claims, such as the case at bar, the grievance affects the collective agreement tangentially at best and the Union has less interest than the employee in pursuing the matter. *Burley (I), supra* at 736. That is true here. For a truly adverse hearing to take place, the employee's participation is necessary. The Union's participation is likely to be half-hearted since the collective agreement is not directly threatened. Further, *Burley (I).* points out that in some cases the Union's interest will be adverse to the employee's. To some degree that is true here. The Union had to choose between two members involved in a fight. It chose Flatt, because of his friendship with Lewis, the Union representative. Lewis purported to represent both parties. Notice would have allowed respondent to present his problem to the PLB.

This is especially true since a 301 suit (29 USC 183) against the Union for failure to fairly represent respondent is precluded. *Brotherhood of RR Tr.* v *Jacksonville Tenn. Co.*, 394 US 369, 377 (1969); *BLE* v *UTU*, 471 F2d 8 (6th Cir., 1972). Because the RLA is the exclusive remedy, *Andrews* v *L & N Ry.*, 406 US 320 (1972) and the National Labor Relations Act specifically exempts railway workers, *Brotherhood of RR. Tr., supra,* a claim against the Union is not possible herein. The case cited by petitioner, *Pyzynski* v *NY Central*, 421 F2d 854 (2d Cir., 1970) does not govern the 6th Circuit, and is of questionable vitality following *Andrews, supra.*

Further, the underpinnings of the duty of fair representation is the fact that in non-railroad industry the Union is the employee's exclusive agent. *Vaca* v *Sipes*, 386 US 1971 (1967). In minor disputes under the RLA the Union is not the exclusive agent.

In *LaFontaine,* respondent insisted that he get notice and present his own claim because he was dissatisfied with his Union representation. The denial of said right clearly prejudiced respondent.

The Statute requires notice be given to grievants. It was not. Certiorari is unnecessary.

C. Petitioners argument that the Sixth Circuit decisions below, and in *Cole* v *Erie-Lackawanna Ry. Co., supra,* misapplies this Court's opinion in *Burley* v *Elgin, A. J. & E. R. Co., (I), supra,* and the Seventh Circuit's opinion in *Kotakis* v *Elgin, J. & E. R. Co., infra,* is without merit.

Petitioner argues that, assuming the provision of §153, (First)(j) apply to public law boards, respondent received legally sufficient notice through his union. Clearly the Sixth Circuit disagreed.

As the Court stated in *Burley (I), supra* at 712, the threshold question is whether or not the Union was authorized to *represent* the employee *before the board* in question. To the extent the employee expressly authorizes the Union to *represent* him or her, no notice need be given to the employee directly. In effect notice has been given to the employee's authorized agent. Likewise in those cases where the employee has expressly repudiated the Union's authorization, formal notice must be served on the employee if the board's decision is to be final and binding. The problem in this area of the law comes about because, in most cases, there is neither an explicit grant of authorization nor an explicit repudiation of such authorization. In *Burley (I), supra,* 738-739, the Court indicated in footnote 38 that the question of authorization could be resolved by reference to the "common law" rules of agency. However, in *Burley (II), supra,* the Court on rehearing seemingly developed an approach more specifically de-

signed to deal with the peculiarities of the railroad industry. While maintaining that the question of authorization was ultimately a fact question to be resolved on a case by case basis, the Court in *Burley (I), supra* at 664, held that the union was presumed to appear before the Board with full authority to represent the employee. Further that the individual employee was obligated to act affirmatively to dispel that authorization, *Burley (II), supra* at 665, n. 7. The Court imposed this obligation on the employee to act affirmatively because it was convinced that the employee would have knowledge of the proceedings and could act to assert his right to appear personally if he so desired.

> ". . . there cannot be many instances in which an aggrieved employee will not have knowledge or notice that negotiations affecting his claim are being conducted or, if they fail that proceedings are pending before the Board to dispose of it." *Burley (II), supra* at 666.

In footnote 9 the Court explained that it assumed knowledge on the part of the employee because the act guaranteed that the employee would receive "due notice". Without defining due notice, the Court held that it required "at least, we think, knowledge on the aggrieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency." *Burley (II), supra* at 666, n. 9.

What is clear is that, as a minimum, the individual employee must have sufficient information to allow him to assert his rights before the board if he chooses to do so.

This minimal due process safeguard of actual notice is especially important in the context of the public law boards.

As noted above, only the union can submit cases to public law boards, whereas either the union or the employer could file the claim with the NRAB.

It is the employee's ability to go to the NRAB by himself or with counsel of his own choosing which raises the presumption of authorization when the employee requests that his union make the submission. *Burley (II), supra* at 663-4. This same choice does not exist with the public law boards. In this situation the employee faces the alternative of submitting his claim to the NRAB and waiting up to five (5) years for a decision or asking his union to submit his case to a public law board. In this context, it is hardly fair to presume that the employee has voluntarily waived his right to appear personally.

This is not the only difference between the NRAB and the public law boards. An even more important reason to insist on notice of the hearing in cases before the public law board stems from the difference in the character of the two boards. The NRAB is a permanent institution with a permanent location and address. Public law boards, of which there are 459, c.f. *Seidenberg, supra,* p. 232 are the exact opposite. They constantly come into and go out of existence. They have no permanent offices or addresses to which mail can be sent or at which personal appearances can be made.

If we are to imply authorization from the employees inaction (or, more accurately, if we are to say that the presumption of the union's authorization is not rebutted because of the failure of the employee to act affirmatively to rebut it), we must be satisfied that the employee's inaction was his own fault.

In cases before the public law boards it is doubly certain that we cannot imply authorization from inaction without proof that the employee, *at least,* had actual notice which would have allowed him to act affirmatively if he chose to. *Burley (II), supra* at 666, n. 9. In cases before the public law boards, it is clear that the employee could never

act to assert his right of appearance without some indication as to where the hearing would be held or where he might go to insure that he be given notice.

Petitioner alleges — that, the Sixth Circuit's opinion in *Cole, supra* departs from *Burley, supra* and is in conflict with *Kotakis* v *Elgin J. & E. Ry.*, 520 F.2d 570 (7th Cir.) cert. den. 423 US 1016 (1975).

In fact, there is no conflict, nor is there any basis for certiorari in this case.

In *Kotakis, supra,* the Court without an analysis, and in dicta, stated that the record reflected that the employee authorized the union to represent him *before the NRAB, Kotakis, supra* at p. 576. Obviously, where such authorization is contained in the record, the notice question, as posed above, need not be addressed.

In *Cole,* the only authorization in the record, was the authorization to handle the grievance and submit it to the public law board if necessary. In that situation, the Court held that the notice requirement was satisfied by *actual* notice of the hearing for a sufficient period to allow the employee to act upon the notice, *Cole, supra,* p. 534. What is important in *Cole* is the holding that when the Union is authorized to submit a grievance, the decision of the board is binding on the individual employee, absent formal notice, so long as he has actual notice of "the hearing for a sufficient period prior thereto to permit the employee" to act on such notice, *Ibid.*

It is clear that *Cole* is not in conflict with *Burley.* What is essential in both cases is that the employee is equipped with sufficient knowledge to assert his right to personally appear if he wishes to do so. Cf. *Burley (II), supra* at 666, n. 9; and *Cole, supra* at 534. Moreover, this petition for certiorari is addressed to this particular case.

In the instant case there can be no question that respondent did not wish to waive his right to represent himself before the public law board. This alone demarcates this case from *Kotakis.* This alone requires that the board's decision be set aside because he was not given notice of the hearing.

There is absolutely nothing in this record which would indicate that respondent's right to represent himself which this Court preserved in *Burley (II), supra,* was adequately protected.

Respondent chose to go to the public law board rather than wait an additional three years for a decision before the NRAB. As a result he had to ask his union to submit his case. Such a request does not constitute authorization to receive notice, or act on the employee's behalf. See *Burley (II), supra* at 447, 746, n. 3. He made it clear to the union that he wanted to represent himself. The union agreed. He received no formal or actual notice of the hearing, nor did he have any actual or formal notice of which public law board had docketed his case (there are approximately 450 public law boards which periodically come into and go out of existence as they complete their dockets); as a result respondent could not exercise his right to appear personally.

Given these facts, we must conclude that Mr. LaFontaine, respondent herein, did not expressly or implicitly authorize the union to represent him before the public law board.

Petitioner has raised the alarm that *Cole, supra,* and the instant case portends disaster for the public law boards. In fact the test of *Cole,* actual notice, can easily be met if the carriers, unions and public law boards wish to do so. A simple letter would be one of many ways, that such notice could be given.

In reality, Petitioner's cries of alarm reveal their real objection to the notice requirements of *Cole* (and of *Burley)*. Petitioners do not wish to give any notice of the hearing because they wish to exclude employees from the hearing. Their contention that *Burley* does away with the notice provision is tantamount to their original argument that the union is the exclusive representative in cases before the public law boards.

Petitioner's second ground for certiorari is without merit. The *Burley* cases were applied correctly by the Sixth Circuit. There is no conflict with the Seventh.

CONCLUSION

For the reasons sttaed herein certiorari should be denied.

Respectfully submitted,

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APPENDIX

45 U.S.C. 153 (Second)

System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such

a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of

disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

May 20, 1926, c. 347, § 3, 44 Stat. 578; June 21, 1934, c. 691, § 3, 48 Stat. 1189; June 20, 1966, Pub.L. 89-456, §§ 1, 2, 80 Stat. 208, 209; Apr. 23, 1970, Pub.L. 91-234, §§ 1-6, 84 Stat. 199, 200.

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IN THE

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OCTOBER TERM, 1978

No. 78-335

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

vs.,

ROBERT LaFONTAINE,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

STATEMENT OF GROUNDS FOR FILING SUPPLEMENTAL BRIEF

On August 11, 1978, the Court of Appeals for the Seventh Circuit, rendered its opinion in *O'Neill* v *Public Law Board No. 550*. This opinion, bearing docket number 77-1339, has not been officially reported, but the text of it has been published in the advance sheets to CCH *Labor Law Reports*, dated September 8, 1978,

and may be found at 84 CCH *Labor Cases* Paragraph 10772. For the reasons which appear below, petitioner respectfully calls this Court's attention to this decision pursuant to Rule 24(5) as a new case not available at the time of petitioner's August 28, 1978 filing of its petition for a writ of certiorari. The *O'Neill* opinion, as so published, is included at the end of this supplemental brief.

ARGUMENT

In Section C of the Argument portion of our Petition, we relied on another Seventh Circuit opinion — *Kotakis* v *Elgin, J & E R*, 520 F2d 570, cert den 423 US 1016 (1975) — to support the proposition that where a discharged railroad employee has authorized his union to submit his claim for reinstatement to an adjustment board and knows that his case is pending there, then notice by the board of the proceedings to the union satisfies the notice requirement of Section 153 First (j) of the Railway Labor Act, 45 USC § 151 et seq., even though the employee receives no notice from the Board. Moreover, we urged that *Kotakis* appeared to conflict with the result reached below by the Court of Appeals for the Sixth Circuit which we read as extending the Sixth Circuit's holding in *Cole* v *Erie Lackawanna Ry Co*, 541 F2d 528 (1976), cert den 433 US 914 (1977), to all public law board cases so that, *Kotakis* notwithstanding, all railroad employees are required by Section 153 First (j) to be given notice by the Public Law Board before which there cases are being handled by their unions. If there could have been any doubt of the existence of a conflict between the Sixth and Seventh Circuits before, *O'Neill* v *Public Law Board No. 500, supra*, effectively removes it.

In *O'Neill*, a railroad employee was discharged for drinking on the job. The United Transportation Union — the same labor organization involved in *Kotakis*, *Cole* and *LaFontaine* — caused the employee's claim to be placed before a Public Law Board pursuant to 45 USC § 153, Second, the same kind of Board involved in *Cole* and in this case, but not in *Kotakis* (where the claim was submitted to the National Railroad Adjustment Board under 45 USC § 153 First). The Board ruled against the employee who commenced an action to review the unfavorable award.

In urging that the award be set aside, the employee claimed that the public law board was required to give him notice and had failed to do so. The Seventh Circuit, in contrast with the Sixth Circuit's ruling below and in *Cole*, ruled that the notice given the union by the Board satisfied the notice provision of Section 153, First (j) and any requirements of due process of law because, by virtue of the union constitution — the same constitution applicable here and in *Cole* — the employee had authorized his union to represent him before the Board and to receive notice of hearing on his behalf.

As to *Cole*, the Seventh Circuit had this to say:

> "[W]e hold in contrast to the Sixth Circuit that where an individual employee authorizes his union to represent him before such boards and to receive any notices on his behalf, Section 153 First (j) does not require that actual notice be given to the individual employee.[5]
>
> "[5] This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the

> *conflict* between the holding of this case and the holding of the Sixth Circuit in *Cole* v *Erie Lackawanna Ry Co, supra.*" App at p A6 (emphasis supplied).

Additionally, the Seventh Circuit took issue with the Sixth Circuit's reading of *Kotakis* (541 F2d at 534):

> "[4] Although the Sixth Circuit stated that it agreed with a line of Seventh Circuit decisions, we think those decisions do not go so far as to require that the employee receive actual notice of the hearing." App at p A5.

Quite apart from *O'Neill's* gloss on *Cole* is the former's impact on the ruling by the Sixth Circuit in the case below. The conflict with respect to this case is self-evident for, in both appeals, (1) the same union constitution bestowing authority to represent, and receive notice on behalf of, the employee was involved, and (2) the employee's claim in each case was before a public law board. The only difference of distinction between the *O'Neill* and *LaFontaine* case is, quite paradoxically, that O'Neill apparently asserted that he had revoked his union's authority to act for him, thu entitling him to individual notice whereas here, LaFontaine who does not claim to have revoked his union's authority to act on his behalf, urges that he was nevertheless entitled to notice because he wished to be present at the time of the hearing and without Board notice could not be, his union having reneged on its promise to impart to him the notice he authorized it to receive on his behalf. We believe that the conflict between the circuits is manifest.

The conflict is intensified by the fact that this Court earlier declined to review the very decisions giving rise

to the onset of the conflict. Because this Court has yet to pass upon the substance of the Public Law Board mechanism, now twelve years in use, the other nine circuits are left without direction from this Court while, in the meantime, lower courts in the Sixth Circuit remain equally without direction on the overriding question of the extent to which, beyond the mere mailing of a notice, a Public Law Board is required to go to assure to railroad employees whatever vague rights the Sixth Circuit has impliedly created at the expense of union authority to handle its member's claims.

For these reasons, we ask this Court to grant our petition.

Respectfully submitted,

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Dated: October 3, 1978

OPINION

(United States Court of Appeals for the Seventh Circuit)
(No. 77-1339, August 11, 1978)
P. J. O'Neill v. Public Law Board No. 550

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Before FAIRCHILD, Chief Judge, TONE, Circuit Judge and CAMPBELL, Senior District Judge.*

[*Statement of Case*]

CAMPBELL, S. D. J.: Plaintiff-Appellant O'Neill had been employed as a brakeman by the Penn Central Transportation Company (Penn Central) since 1941. He was also a member in good standing of the United Transportation Union (Union), which was the duly designated and authorized representative of the plaintiff under the Railway Labor Act (Act), 45 U. S. C. § 151 *et seq*. On May 9, 1972, O'Neill was suspended from employment pending a hearing into the charge that he had been in an unfit condition and in possession of alcoholic beverages during his tour of duty. On May 15, 1972, a customary "on the property" hearing was conducted, at which time O'Neill was present and accompanied by two representatives of the Union. On the following May 29, plaintiff was notified that he had been dismissed.

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

After two unsuccessful appeals of his dismissal through the Penn Central's review procedures, plaintiff, through his representative, sought arbitration. Plaintiff's case was placed on the docket of defendant Public Law Board No. 550 (Board), a special adjustment board created pursuant to the second paragraph of § 3 Second of the Act, 45 U. S. C. § 153 Second. On behalf of the plaintiff the Union presented a written submission and argued the case orally before the Board. The Penn Central similarly presented its position. In an award dated October 29, 1973, the Board denied plaintiff's claim.

Plaintiff then instructed [sic] this action in the district court seeking to have the decision of the Board[1] set aside for failure to comply with the provisions of the Act. On cross motion for summary judgment in favor of the defendant Board. We affirm.

[*Review of Public Board Award*]

In *United Transportation Union v. Indiana H. B. R. Co.*, [79 LC Paragraph 11,574] 540 F. 2d 861 (7th Cir. 1976), with which decision the present case was consolidated in a prior appeal, this Court held that the district courts have jurisdiction to review, at the behest of either aggrieved party, awards of public law boards created

[1] Neither the employee member nor the neutral member of Public Law Board No. 550 has appeared in this action. Appellee S. J. Wilson appeared in his capacity as carrier member of the Board and represents the interest of Penn Central in this appeal.

under § 3 Second of the Act. The scope of judicial review of the awards of such public law boards was established to be co-extensive with the scope of review of awards of the divisions of the National Railway Adjustment Board under 45 U. S. C. § 153 First (q), *i.e.*, the findings and order are conclusive on the parties except that the order may be set aside where there is failure of compliance with the requirements of the Act, where the order exceeds the Board's jurisdiction, or where there is fraud or corruption of a member making the order. In addition to these statutorily created parameters of review, it has been recognized that the decisions of the National Railway Adjustment Board are reviewable if they are violative of due process. *Union Pacific R. Co. v. Price*, 360 U. S. 601, 616 (1959); *Kotakis v. Elgin, J. & E. R. Co.*, [78 LC Paragraph 11,241] 520 F. 2d 570, 574 (7th Cir. 1975); *Edwards v. St. Louis-San Francisco Railroad Company*, [53 LC Paragraph 11, 232] 361 F. 2d 946, 953-954 (7th Cir. 1966); *Ellerd v. Southern Pacific Railroad Co.*, [31 LC Paragraph 70, 526] 241 F. 2d 541, 545 (7th Cir. 1957).

Plaintiff contends that the award of the Board is violative of his due process rights and failed to comply with the provisions of 45 U.S.C. § 153 First (j) because he was not personally given notice of any hearings before the Board, and he was not given the opportunity to appear personally before the Board.[2] Because the record demonstrates that plaintiff's representative, the United Transportation Union, received all necessary

[2] The complaint does not allege, nor does the appellant assert here that he did not know of the pendency of proceedings before the Board.

notices and represented plaintiff fully before the Board, as it was authorized to do, we find compliance with the requirements of both due process and 45 U. S. C. § 153 First (j).

Initially, we find no merit to the plaintiff's claim that the Union was not authorized to represent him before the Board because, after his discharge, he was no longer a member of the union and had not paid dues for the nearly two years prior to the Board's hearing in this case. It is well established that a union's duty to represent its members in disputes extends to those employees who have been dismissed. *E.g., Czosek v. O'Mara,* [62 LC Paragraph 10,680] 397 U. S. 25 (1970); *Vaca v. Sipes,* [55 LC Paragraph 11,731] 386 U. S. 171 (1967); *Conley v. Gibson,* [33 LC Paragraph 71,077] 355 U. S. 41 (1957).

Our first area of consideration is whether the provisions of 45 U. S. C. § 153 First (j) are applicable to proceedings before public law boards established under the second paragraph of 45 U. S. C. § 153 Second. 45 U. S. C. § 153 First (j) provides:

> Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them.

Nothing in 45 U. S. C. § 153 Second expressly incorporates the above-quoted provision pertaining to

divisions of the Adjustment Board into the provisions for public law boards. In this respect, we note that Section 153 Second suffers from the same deficiency of "inartful wording" expressed by the panel in *United Transportation Union v. Indiana H. B. R. Co., supra,* 540 F. 2d at 861. On the basis of the legislative history[3] of the 1966 Amendments to the Act, which evidences a Congressional intent that Section 153 Second incorporate the procedural requirements of Section 153 First (j), the Sixth Circuit has held that the provisions of Section 153 First (j) are applicable to proceedings before public law boards. *Cole v. Erie Lackawanna Ry. Co.,* [79 LC Paragraph 11,575] 541 F. 2d 528, 533 (1976), *cert denied,* — U. S. — 97 S. Ct. 2987 (1977). The majority of the *Cole* Court also held that even in the situation where an individual employee has authorized a union to represent him in proceedings before a public law board, actual notice of the proceedings must be given to the individual employee.[4] *Id.,* at 534. While we agree with the Sixth Circuit's reasoning and conclusion that the provisions of Section 153 First (j) are applicable to proceedings before public law boards, we hold in contrast to the Sixth Circuit that where an individual employee authorizes his union to represent him before such boards and to receive any notices on his behalf,

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[3] See 1966 U.S. Code Cong. and Admin. News, p. 2285 *et seq.*

[4] Although the Sixth Circuit stated that it agreed with a line of Seventh Circuit decisions, we think those decisions do not go so far as to require that the employee receive actual notice of the hearing.

Section 153 First (j) does not require that actual notice be given to the individual employee.[5]

[*Notice Requirement*]

In the instant case, notice was served upon, and plaintiff was represented by the United Transportation Union. Under the terms of the Union's constitution:

> Every member of the United Transportation Union grants complete authority to the United Transportation Union and any of its constituted representatives to act in said member's behalf for the purpose of disposing, in any manner, of any and all of said member's claims, complaints or grievances against their employer; and to submit such claims, complaints, or grievances for determination to any person, board, or other tribunal provided by law or otherwise as may be deemed to be necessary. The United Transportation Union shall have authority to receive notice of the hearings, or to waive hearing, and to appear for, represent, and act for its members before any person, board, or other tribunal in connection with consideration and determination of claims, complaints, or grievances, subject to the right of appeal in accordance with the provisions of this

[5] This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the conflict between the holding of this case and the holding of the Sixth Circuit in *Cole v. Erie Lackawanna Ry. Co., supra.*

> Constitution, except where the member involved serves reasonable written notice on the United Transporation Union to the contrary.

Plaintiff did not serve written notice on the Union that he did not want the Union to represent him.

In *Elgin J. & E. R. Co. v. Burley*, [9 LC Paragraph 51,212] 325 U. S. 711 (*Burley I*) (1945), adhered to on rehearing, *Elgin J. & E. R. Co. v. Burley*, 327 U.S. 661 (*Burley II*) (1946), the Supreme Court was concerned with the question of the sufficiency of a collective bargaining representative's authority to represent individual employees as claimants before the National Railroad Adjustment Board. *Burley I* noted that the employee's rights under Section 153 First (j) are statutorily created rights which "he may exercise independently or authorize the union to exercise in his behalf." 325 U. S. at 740 n. 39. Although the Court in *Burley II* refrained from making a definitive statement of what might be sufficient evidence of a union's authority to represent an employee exclusively before the National Railroad Adjustment Board, the Court did indicate that "custom and usage" as well as "appropriate provisions in [a union's] by-laws, constitution, or other governing regulations" might serve as an adequate basis for such authority. 327 U. S. at 663-664 and n. 2.[6] We have also indicated that

[6] After the decision in *Burley II*, labor organizations apparently secured amendments to their constitutions providing for the consent of all members to a union's prosecution of grievances on behalf of its members. See *Employees v. Westinghouse Corp.*, [27 LC Paragraph 69,063] 348 U. S. 437, 458 (1955) (Opinion of Justice Frankfurter).

an employee may so authorize a union to represent him in proceedings before the National Railroad Adjustment Board that any notice received by the union on the employee's behalf is sufficient to fulfill the requirements of Section 153 First (j). See *Kotakis v. Elgin J. & E. R. Co., supra*, 520 F. 2d at 576; see also *Ellerd v. Southern Pacific RR Co., supra*, 241 F. 2d at 541, on remand, 191 F. Supp. 716 (N. D. Ill. 1961); cf. *Simberlund v. Long Island Rail Road Co.*, [62 LC Paragraph 10,645] 421 F. 2d 1219, 1225 (2nd Cir. 1970).

The record in this case shows that the Union initiated proceedings[7] before the Board following unsuccessful appeals within the Penn Central. The Union filed a submission and argued orally before the Board on plaintiff's behalf.[8] We find that by virtue of his

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[7] Under the terms of § 3 Second of the Act, an individual employee has no right to bring a matter before a special adjustment board. Only a rail carrier or "the representative of any craft or class of employees" are authorized by the statute to bring a matter before a special adjustment board. See *Brotherhood of Locomotive Engineers v. Denver & R. G. W. R. Co.*, [60 LC Paragraph 10,181] 411 F. 2d 1115, 1118 (10th Cir. 1969). Further, where an employee chooses not to be represented by his union, a rail carrier cannot submit a dispute involving the employee to a special adjustment board. *Chicago, R. I. & P. R. Co. v. National Mediation Board*, [64 LC Paragraph 11,351] 435 F. 2d 339 (7th Cir. 1970).

[8] Although § 3 Second indicates that the members of special adjustment boards are to "determine all matters not previously agreed on by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board," neither the statute nor the regulations promulgated thereunder (29 C. F. R. § 1207.1 *et seq.*) indicate the type of proceeding to be conducted by special adjustment boards. Counsel have advised us that in disciplinary matters such as this case, the board generally reviews the record made "on the property" of the carrier and the submissions of the parties. Generally, no new evidence is presented before public law boards.

membership in the Union, plaintiff authorized that organization to represent him in his disciplinary and review proceedings, and to receive any necessary notices on his behalf within the meaning of *Burley II*. As such, we find compliance with due process and sufficient satisfaction of the requirements of 45 U. S. C. § 153 First (j).

Accordingly, for the reasons stated herein, the judgment of the district court is affirmed.

Supreme Court, U. S.
FILED
OCT 27 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

No. 78-335

VS.

ROBERT LAFONTAINE,

Respondent.

REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner, No. 78-335

vs.

ROBERT LAFONTAINE,

Respondent.

REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

Introduction

Petitioner has filed a supplemental brief in support of its petition based on *O'Neill* v. *Public Law Board No. 550*, CA No. 77-1339 (7th Cir., 1978). This Brief is respondent's reply.

ARGUMENT

In its petition for certiorari the carrier has alleged two grounds. First, it says that 29 USC 153 (First) (j) does not apply to Public Law Boards. Second, it argues that even if 29 USC 153 (First) (j) applies, that statute was complied with in the case at bar. If the *O'Neill* case, *supra*, supports petitioner at all, it is only supportive of the second argument.

The Seventh Circuit, in *O'Neill,* holds that:

> ". . . we agree with the Sixth Circuit's reasoning and conclusion that the provisions of Section 153 (First) (j) are applicable to proceedings before Public Law Boards . . . *O'Neill,* 99 LRRM 2204, 2206."

Thus it is clear that the Notice and Appearance provision applies to *LaFontaine.* The Seventh Circuit relied on *Cole* v. *Erie Lackawanna Ry.,* 541 F2d 528 (6th Cir., 1976) to support its decision, and cites the same legislative history the *Cole* Court cited. *O'Neill, supra,* makes clear that 29 USC 153 (First) (j) applies to Public Law Boards established pursuant to 29 USC 153 (Second). No grounds for certiorari are present for there is no conflict between Circuits, or between this Court and any Circuit. Petitioner's first ground for certiorari is even less convincing after *O'Neill.*

Petitioner cites *O'Neill* only as support for its second ground for certiorari. Petitioner argues, in its supplemental brief, that after *O'Neill* it is clear that the Sixth and Seventh Circuits are in conflict. Petitioner writes:

> As to *Cole,* the Seventh Circuit had this to say:
>
> "We hold in contrast to the Sixth Circuit that where an individual employee authorizes his Union to represent him before such boards and to receive any notices on his behalf, Section 153 (First) (j) does not require actual notice be given to the individual employee." Petitioner's Supplemental Brief at p. 3 citing *O'Neill, supra.*

The *Cole* Court had held that:

> ". . . in situations where employee-grievants have authorized their Union to handle their grievances NRAB statutory notice provisions are satisfied if the employee receives actual notice of the proceedings. [cites omitted]"

> "Actual notice for this purpose is notice of the hearing for a sufficient period prior thereto to permit the employee to consult with Union officials and relay such information as he possesses which might allow the Union to more effectively present his claim." *Cole, supra* at 534.

The conflict is apparent. *Cole* says that even if the Union is authorized, notice must be sent to grievant. *O'Neill* disagrees. *Cole* relied on Seventh Circuit opinions to reach its decision. The Seventh Circuit now says, in *O'Neill,* that the cases cited by *Cole* do not support the conclusion reached by *Cole.*

Although the clash between *O'Neill* and *Cole* is clear, that conflict does not affect *LaFontaine.* Petitioner does not analyze the effect of this conflict on the case at bar in its supplemental brief.

In both *O'Neill* and *Cole* the Courts held the employee had authorized the Union to represent him before the Board. In *LaFontaine,* that authorization is, in fact, one of the issues. Under *Cole* even if LaFontaine authorized the Union to represent him, he still had a right to notice. However, unlike *O'Neill* or *Cole,* LaFontaine had not authorized his union to do any more than convene a Public Law Board. He specifically told the union he would represent himself, and the union agreed to this procedure.

In fact, the Sixth Circuit frames the issue in *LaFontaine* differently than either *Cole* or *O'Neill.* The Court writes:

> "The sole issue in this case is whether an employee *on whose behalf a union had submitted a claim of wrongful discharge* to a Public Law Board created pursuant to the Railway Labor Act was entitled to actual notice of hearing . . ."

The Court recognized the authorization issue for it does not state the union was authorized, to represent respond-

ent before the Board, only that the union submitted a claim on respondent's behalf; i.e., had convened a Public Law Board. Under the *Burley* cases such mere submission does not equal authorization. *Elgin J & E Ry.* v. *Burley,* 325 US 711 at 746, 16 LRRM at 763 (1945-Burley (I)). The *LaFontaine* Court then goes on to cite *Cole's* language defining actual notice, and requiring it even when the Union is so authorized. It is obvious that if notice is required when the union is authorized, it is more needed when the union is not authorized.

This factual difference delineates *LaFontaine* from *Cole.* It also shows that the conflict is between *Cole* and *O'Neill,* not *LaFontaine* and *O'Neill.* Although petitioner believes O'Neill argued that he revoked the union's authorization, respondent finds no evidence of such an argument in the *O'Neill* decision. On the other hand, it is undisputed that LaFontaine not only asked to represent himself, but that the union agreed he should do so. The Sixth Circuit recognized the authorization problem in the instant case. If the Seventh Circuit held the Union was not authorized, as was the case in *LaFontaine,* it too would have held that LaFontaine deserved notice, and would remand the claim to the Public Law Board. There is no conflict between *LaFontaine* and *O'Neill.* The result in *LaFontaine* would be the same in both circuits.

Elgin J & E Ry. v. *Burley,* 327 US 661 (1946 — Burley (II)) Court frames the issue of authorization as follows:

> ". . . what might be sufficient evidence of the collective agent's authority either to settle finally the aggrieved individual employee's claim or to represent him exclusively before the Adjustment Board." *Supra* at .....

The Court refrains from answering this question. The Court writes that an award is presumed valid because:

> "There can be no presumption that the union submitting the dispute would undertake to usurp the aggrieved employee's right to participate in the proceedings by other representation of his own choice . . ."

Yet that is exactly what petitioner urges. *Burley (II)* attempted to preserve various rights, such as conferring with the carrier prior to settlement, rejecting a settlement, and having his or her own representative before the Board. Those rights were denied herein. The Sixth Circuit has determined that the best way to preserve them is to require actual notice to the employee so that he or she may participate. That is clearly a reasonable and easily complied with requirement.

The *O'Neill* Court would also, presumably, require actual notice in cases where the union was not authorized to represent grievant. That rule is harder to administer for it requires a finding by each Public Law Board that authorization exists.

The question of authorization was dealt with in respondent's brief. (pp. 13-18) *Burley (II)* suggests that a union is presumed to be authorized to represent a grievant before the Boards. Various factors support that presumption, all of which may be rebutted. In the case at bar petitioner relies on these factors. First, it says respondent stood by without acting while the union pressed his claim. The facts belie this notion; for respondent told his union he wanted to represent himself and the union agreed. Second, petitioner says that since respondent's union submitted his claim the presumption arises. There is no such legal rule. In fact, *Burley (I), supra* at 746, contains language which clearly negates this factor. That Court wrote:

> "Nor can we say as a matter of law that the mere making of a complaint through local Brotherhood officials amounted to final authorization to the union to

settle the claims or represent the employees before the Board."

This statement is more compelling in the context of a Public Law Board where the employee-grievant has no right to appeal to that Board on his own.

The final factor relied on by petitioner is Article 44 of the UTU Constitution which purports to authorize the Union to represent all members in minor disputes. The *Cole* Court held that, "any existing doubt must be resolved in favor of authorization in light of Article 44." *Supra* at 534. This factor, however, in *LaFontaine* was rebutted by undisputed evidence that the union agreed to allow respondent to appear on his own behalf, and agreed to notify him of the hearing. In essence, the union waived its authorization.

Further, the constitution does not have conclusive weight as to the issue of authorization. *Burley (II), supra.* In fact, the *Burley (II)* Court's suggestion that the union constitution may provide authorization is less valid today than it was when *Burley (II), supra* at Fn. 2, and *Burley (I),* at Fn. 38, were decided. As *Burley* (*I*) notes: ". . . the Act [RLA] does not contemplate the existence of closed shops . . ." *supra* at Fn. 31. The UTU and petitioner today operate a union shop. The *Burley* decisions suggested that rules governing Constitutional provisions of voluntary, unincorporated associations might be used to establish authorization. This union is no longer a wholly voluntary group. By joining it, respondent does not necessarily freely accept its rules. Failure to join, results in a loss of employment. This added factor makes the *Burley* footnotes of questionable vitality, today.

Furthermore, *Burley (I)* specifically prohibits the union and carrier from establishing a collective agreement that would abrogate individual rights under section (j). To-

day, that is exactly what has happened. The UTU and company negotiated a union shop agreement, requiring all employees to accept Article 44, or lose their jobs. Article 44 cannot, under *Burley (I)* be given conclusive weight. As a presumption, it stands rebutted herein.

Besides, this conflict between circuits is not of such moment that action by this Court is needed. Not many cases can exist with the factual basis of the instant case. The requirement of actual notice to the employee is easily met. Each Public Law Board must simply send a letter to each grievant. This is not a big job since each Public Law Board has only about thirty claims, requiring thirty letters. In a very real sense, this petition presents much ado about nothing. However, to respondent that notice was crucial. It meant the difference between a fair hearing, since he could not rely on his union, and a hearing that ignored key parts of his claim. The end result is the difference between employment, and unemployment.

In conclusion, respondent believes certiorari should be denied. First of all, *O'Neill* clearly applies §(j) to Public Law Boards. Second, even if there is a conflict between *Cole* and *O'Neill,* regarding the method of satisfying §(j), that conflict does not apply herein. *LaFontaine* is distinguishable from both. Third, even if the conflicts exist, the Sixth Circuit's result was correct because the union was not authorized to represent respondent. Fourth, the *Cole* case is correct in requiring notice under *Burley (II),* as a simple way of satisfying the statutory rights. This rule is easily complied with, so that this petition presents no issue of such importance that this Court should grant certiorari.

CONCLUSION

Respondent prays that this Court deny certiorari.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1978

No. 78-335

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

ROBERT LAFONTAINE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Railway Labor Conference respectfully moves for leave to file the attached brief *amicus curiae*. Petitioner consented to the filing of the brief, but respondent did not.

Almost all of the nation's Class I railroads are members of the National Railway Labor Conference. The Conference represents member railroads both in national collective bargaining pursuant to the Railway Labor Act with unions representing their employees and in regard to other labor-management relations problems that are of concern to the railroads generally.

The decision below interprets Section 3 First (j) of the Railway Labor Act (45 U.S.C. § 153 First (j)) in a man-

ner that is contrary to the overall scheme of that Act and to prior decisions by this Court and by other courts of appeals. If the decision is allowed to stand, it threatens to undermine the finality of arbitration awards disposing of the claims and grievances of railroad employees. The decision is therefore of great importance to the Conference and to each of its member railroads.

The Sixth Circuit's interpretation of Section 3 First (j) was previously before this Court in *Erie Lackawanna Railway Company* v. *L. F. Cole*, No. 76-900, certiorari denied, 433 U.S. 914 (1977) (reported below in 541 F.2d 528). In that case the Conference moved for and was granted leave to file a brief *amicus curiae* at the petition stage. By the attached brief herein the Conference wishes to apprise the Court of its continuing concern over what it views as an incorrect interpretation of Section 3 First (j), and to emphasize several of the more important considerations why the issue decided below should be passed upon by this Court.

For the foregoing reasons, the motion for leave to file the attached brief should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-335

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,
v.
ROBERT LAFONTAINE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

Petitioner seeks review of a decision of the Sixth Circuit that a railroad employee who has authorized his union to represent him in all adjustment board proceedings may challenge an adverse decision by an adjustment board convened under Section 3 Second of the Railway Labor Act on the ground that he himself did not receive notice of the adjustment board hearing, in which his authorized union representative participated fully on his behalf. The Seventh Circuit has held to the contrary, and the conflict warrants resolution by this Court.

1. The Sixth Circuit's decision in this case relied upon an earlier decision by the same court to the same effect in *Cole* v. *Erie Lackawanna Railway Co.*, 541 F.2d

528 (6th Cir. 1976), certiorari denied, 433 U.S. 914 (1977). The National Railway Labor Conference moved for and was granted leave to file a brief *amicus curiae* in support of the Erie Lackawanna's petition for a writ of certiorari in *Cole*. For the reasons set forth in that brief, to which we respectfully refer the Court, we believe that the decision in *Cole* is at odds both with the structure and purpose of the Railway Labor Act and with this Court's decisions in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711 (1945) (*Burley I*), and *id.*, 327 U.S. 661 (1946) (*Burley II*).

Moreover, at this Court's invitation the Solicitor General filed a brief *amicus curiae* in *Cole* expressing the views of the United States. That brief urged (at page 12) that the Sixth Circuit's interpretation of the Railway Labor Act is incorrect, that it "threatens the integrity of the arbitral process under the" Act, and that "this Court should not await the development of a conflict before resolving the question" whether the Sixth Circuit's view is correct.

2. Now there is a conflict among the circuits. In *O'Neill* v. *Public Law Board No. 550*, No. 77-1339, decided August 11, 1978 (Supplemental Brief of Petitioner, App. A1-A9), the United States Court of Appeals for the Seventh Circuit, after noting areas of agreement with the Sixth Circuit in *Cole*, stated (*id.* at A5-A6), "we hold in contrast to the Sixth Circuit that where an individual employee authorizes his union to represent him before [a special adjustment board] and to receive any notices on his behalf, Section 153 First (j) does not require that actual notice be given to the individual employee."* The unanimous panel in *O'Neill* fully appreciated that its view was not reconcilable with that of its sister circuit, for it circulated its opinion among all of the judges of the court in regular active service, and reported that "No judge favored a rehearing *en banc* on the conflict between the holding of this case and the holding of the Sixth Circuit in *Cole* * * *" (*id.* at A6, n. 5).

* In the case at bar, and in *O'Neill*, and in *Cole*, the employee was a member of the United Transportation Union, the constitution of which provides that, unless notified to the contrary by the employee, the union is given "complete authority" to handle a member's claim or grievance, including "authority to receive notice of hearings." Supplemental Brief of Petitioner, App. A6.

This Court should resolve the conflict. For the reasons stated more fully in the briefs *amici curiae* in *Cole*, the interpretation by the Sixth Circuit of the Railway Labor Act is incorrect and stands to create grave uncertainty in the dispute-resolving procedures of that Act. That uncertainty has now been compounded by the conflicting Seventh Circuit decision in *O'Neill*. The issue is of great and continuing concern to both carriers and labor organizations subject to the Act, and should be determined by this Court.

Respectfully submitted,

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